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HOW THE “UNINTENDED CONSEQUENCES” STORY PROMOTES UNJUST INTENT AND IMPACT

Martha T. McCluskey*

The recent economic crisis has breathed new life into policies of upward redistribution, even as it uncovered the disastrous results of a financial market bubble inflated by siphoning assets from the bottom, to the top. The Tea Party and the Occupy Wall Street movements both reflect widespread perceptions that justice has been bitterly upended in a system where the fallout from the crisis devastates many who are most vulnerable, while bailouts protect some of the richest and most culpable. As prospects for major reform dim, the now-familiar concept of “unintended consequences” has repeatedly surfaced to help explain and excuse the legal framework that supports this perverse economic reordering. How can we challenge the ideological story this phrase conveys, in order to open the door to alternative economic policies?

The prevailing tendency to analyze inequality and austerity as a problem of “unintended consequences” deflects scrutiny of injustice. By professing attention to the results of a background politics of presumed benevolence, this phrase mystifies and excuses the structures designed to produce unequal harm. The recent financial crisis is an example of how explaining devastating harm as “unintended consequences” helps quiet the moral and political outrage that such harm might otherwise inspire.

Part I describes the 2008 financial market meltdown as an acute instance of a familiar historic pattern of schemes designed to extract wealth from the middle and bottom socioeconomic groups to deliver unstable gains concentrated at the top. Part II will trace the development of the term, showing how its challenge to social change gives a legal, realist twist to the *Lochner* era message of naturalized inequality. Part III will explore how the concept has muddied debate about the financial crisis and suggests steps for cutting through this obfuscation with a sharper analysis of who should be held responsible for social and economic harms, including possibilities for positive change. Part IV will connect the “unintended consequences” message, which emphasizes the harmful results of law reform, to the coinciding trend in law and politics that insists on analyzing inequality by focusing primarily on good intent, instead of harmful results. These seemingly conflicting messages work together to make structures and institutions designed for racial and economic hierarchy appear natural and necessary, beyond the reach of law.

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I. UNJUST IMPACT

When the harm of this crisis is described as “unintended consequences,” it appears to be a surprise, or an anomaly. Yet this strategy of upward redistribution is part of a pattern familiar to those who have paid attention to the purposes and results of the global neoliberal policies in developing countries. As former “economic hit man” John Perkins describes, as an agent of U.S. and multinational corporations in economically struggling nations of Latin America and Southeast Asia, his job was to “identify countries with resources our corporations covet.”¹ This work required him to concoct elaborate, misleading economic reports as part of a government-backed corporate strategy executed by deceit, bribery, extortion, and violence to pressure the leaders of target countries to agree to exploitative “development” loans.² These unaffordable loans would then effectively induce third-world countries to transfer their natural resources to outside corporations at bargain prices, but with high environmental and cultural costs that were supported by austerity measures designed to divert government spending from economic security of the poor and middle classes to further secure corporate investor gains.³ Perkins argues that the recent crisis reveals how this well-honed scheme now has turned toward the people of developed nations.⁴

The homes of struggling Americans were the coveted resource tapped for dispossession and upward transfer in the recent crisis. The largest Wall Street financial firms joined with numerous ground-level lenders to mine the home equity of the large numbers of Americans who were squeezed by modest incomes, meager government services, and rising debt. Capitalizing on this desperate need for credit, subprime mortgages siphoned struggling Americans’ home equity into investment instruments that produced temporarily high returns for some investors and financial industry executives. Global financial firms poured money into the subprime mortgage industry, supporting its plan to aggressively sell loans with exorbitant fees to borrowers unable to afford the mortgage payments without depending on continuously rising home values or by taking on further debt. The financial firms then earned high fees for packaging these largely unaffordable mortgages into complex interdependent risk-spreading and risk-hedging arrangements marketed to investors as innovative, low-risk, high-return deals. At every financing level, the risks of these deals were covered by various forms of smoke and mirrors, including rampant fraud.⁵ In 2005, for example, this system pumped out \$665 billion in

1. JOHN PERKINS, HOODWINKED: AN ECONOMIC HITMAN REVEALS WHY THE WORLD FINANCIAL MARKETS IMPLoded—AND WHAT WE NEED TO DO TO REMAKE THEM I (2009).

2. See generally JOHN PERKINS, CONFESSIONS OF AN ECONOMIC HIT MAN (2004).

3. See PERKINS, *supra* note 1, at 1. For a further discussion of how finance capital has repeatedly used debt crises to promote neoliberal policies designed to transfer wealth from the poor to the rich, and comparing the recent financial crisis to the policies leading to the 1970s Latin American debt crises, see Tayyab Mahmud, *Is it Greek or Deja Vu All Over Again?: Neoliberalism, and Winners and Losers of International Debt Crises* 50 (Aug. 2010) (unpublished manuscript) (on file with author).

4. PERKINS, *supra* note 1, at 1.

5. See *Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner Before the Committee on Financial Services*, 111th Cong. 2 (2010) (statement of William K. Black, Associate Professor of Economics and Law, University of Missouri-Kansas City). [Hereinafter Black, *Statement on Lehman Bankruptcy*].

subprime loans, representing a 25% growth over the previous year.⁶ By 2007, the bubble was quickly collapsing from defaulting loans and falling housing values, and lenders turned to foreclosure, with large financial firms and their agents appropriating (and skimming further high fees from) now-deflated home equity, in the process destroying a resource that typically comprised the borrowers' primary life savings, as well as a mainstay of less tangible social capital.

Because the risks of the bubble had spread so widely within the financial industry, through interdependent and highly-leveraged deals, the collapse brought losses that threatened to bankrupt most of the large financial firms on which the elite global economy depends. Fearing that these firms were "too big to fail," Congress spent \$700 billion to buy the "toxic" deals under the hastily crafted Troubled Asset Relief Program (TARP), which was followed by over three trillion dollars of nearly free credit for banks from the Federal Reserve,⁷ thanks in part to a 1991 reform law (suggested by Goldman Sachs) that eased requirements that such credit be supported by meaningful collateral.⁸ In contrast, the government did not give discounted credit to keep afloat homeowners faced with collapsing home values and unaffordable mortgage payments.⁹ Reinforcing this unequal rescue policy, major banks defeated federal legislation that would have given judges discretion to modify mortgage terms.¹⁰

Legal scholars, as well as political and business leaders, have justified or even celebrated the growth of the unsound subprime mortgage system with the seemingly egalitarian argument that its expansive credit increased access to home ownership, especially among high-risk groups.¹¹ But to the contrary, because the explosive subprime market primarily focused on tapping existing equity, even before the crisis and collapse in home values, the logical result of subprime lending growth was a net loss of home ownership.¹² Most subprime loans made during the 2004 to 2008 boom were not for new home purchases, but instead went to refinance existing mortgages to provide cash for home improvements, credit card debt, and the basic costs of living or running of small businesses.¹³ Further, a substantial portion of

6. MICHAEL W. HUDSON, *THE MONSTER: HOW A GANG OF PREDATORY LENDERS AND WALL STREET BANKERS FLEECED AMERICA—AND SPAWNED A GLOBAL CRISIS* 261 (2010).

7. SIMON JOHNSON & JAMES KWIAK, 13 *BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* 164 (2010); Gretchen Morgenson, *So That's Where the Money Went*, N.Y. TIMES, Dec. 5, 2010 at BU1 (reporting that the federal government subsidized several leading firms by about \$250 million during just two weeks during the fall of 2008).

8. JOHNSON AND KWIAK, *supra* note 7, at 152 (citing Pub. L. 102-242 Title IV § 473 (1991), which amended 12 U.S.C. § 343).

9. David Streitfeld, *Panel is Critical of Obama Mortgage Modification Plan*, N.Y. TIMES, Dec. 14, 2010 at B2 (reporting the Treasury Department's mortgage modification plan for homeowners, which subsidized banks to encourage them to modify mortgages, helped less than one million homeowners).

10. JOHNSON AND KWIAK, *supra* note 7, at 179.

11. HUDSON, *supra* note 6, at 222 (discussing Ameriquest's public relations theme); *see, e.g.*, Todd J. Zywicki, *The Law and Economics of Subprime Lending*, 80 U. CO. L. REV. 1, 86 (2009).

12. CTR. OF RESPONSIBLE LEARNING, *SUBPRIME LOANS: A NET DRAIN IN HOME OWNERSHIP* (2007) (finding that from 1998-2006, subprime loans resulted in a net loss of homeownership for one million families) [hereinafter CRL], *available at* <http://www.responsiblelending.org/mortgage-lending/research-analysis/Net-Drain-in-Home-Ownership.pdf>.

13. CRL at 17. HUDSON, *supra* note 6, at 222 (reporting that at the peak of its business in 2004, leading subprime lender Ameriquest provided just 1% of its mortgages for home purchases, with the rest going to refinancing and home improvement).

subprime loans were made to homeowners who qualified for more affordable conventional loans.¹⁴

As the boom turned to bust, losses suffered by those near the bottom escalated. In a 2010 report, the Center for Responsible Lending (CRL) estimated that 2.5 million foreclosures took place from 2007 through 2009, with more than double that number facing imminent risk of foreclosure, and with independent experts estimating ten to thirteen million foreclosures likely before the end of the crisis.¹⁵ Nearly one-quarter of American borrowers are “underwater,” owing more on their home mortgages than their homes are worth. The vast majority of the properties foreclosed from 2007 to 2009 resulted from loans initiated between 2005 and 2008 on owner-occupied homes.¹⁶

The impact of these foreclosures is skewed by race as well as by income, even though the majority of borrowers facing foreclosure are white homeowners. The CRL report estimated that seventeen percent of all Latino homeowners and eleven percent of African-American homeowners have already lost or are at imminent risk of losing their home,¹⁷ compared to seven percent of non-Hispanic white homeowners. American-Indians, Hawaiians and other Pacific Islanders, including Asian-Americans also experienced higher foreclosure rates.¹⁸

The racially-skewed impact of the crisis goes well beyond those who face the loss of their home. Waves of foreclosures cause major, long-term harm to the communities in which they are concentrated. With housing highly segregated by race and class in the United States, communities of color are at risk of particularly devastating indirect losses from the effects of foreclosures on neighboring properties and on neighborhood socioeconomic conditions. The CRL report estimated that foreclosures will cause property values to drop by \$194 billion in African-American communities, and \$177 billion in Latino communities between 2009 and 2012. These collapsed home values can raise the costs of moving to escape devastated communities and to take new jobs, especially if homeowners have to pay off underwater mortgages. Further, as homeowners default on unaffordable mortgages or go into bankruptcy, many will be locked out of future economic opportunities because of the use of credit ratings as a proxy for merit by employers and others.¹⁹

Of course, the collapse of the mortgage boom also has had major indirect effects on the economy beyond housing. Wall Street’s highly-leveraged and interdependent bets on that boom spread costs throughout the global financial industry, widely destroying jobs, investments, and tax revenue. In 2010, unemployment remained high, many Americans had lost substantial retirement savings beyond their homes, and the recession (along with declining property values)

14. JOHNSON & KWIAK, *supra* note 7, at 195-96 (citing findings of Housing and Urban Development Secretary that 33% of subprime loans in New York City were to borrowers qualifying for conventional loans); HUDSON, *supra* note 6, at 243-44.

15. DEBBIE GRUENSTEIN BOCIAN ET AL., FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 2-3 (2010), *available at* <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

16. *Id.* at 2, 20 n. 1 (attributing 83% of foreclosures in 2007-09 to loans originated between 2005 and 2008).

17. *Id.* at 3.

18. *Id.* at 2.

19. Katie Leslie and Marcus K. Garner, *Bad Credit Blamed for Some Not Scoring a Job*, CHI. TRIBUNE, Nov. 14, 2010, at C10.

had left state and local governments with budget deficits and cuts in government spending.²⁰ Unemployment and reduced government services are likely to have particularly harsh effects on racial minorities and on modest and low-income households and communities. A U.S. financial market meltdown is likely to increase global inequality and poverty, as people of color in developing nations disproportionately bear the costs of a crisis orchestrated by Wall Street elites.²¹

One of the many individual homeowners whose equity was tapped for this global harm was Elizabeth Redrick, a seventy-seven year old African-American widow and retired hospital housekeeper in Cleveland, who refinanced her mortgage to pay off a \$3,600 personal loan.²² A broker assured her the refinancing with a major subprime lender would not only provide the cash to cover that debt, but also would lower her mortgage payments on the home she had lived in for thirty-seven years.²³ The actual loan produced only \$651 in cash, after subtracting \$5,400 in up-front fees (most of which went directly to the broker), without lowering her monthly payments, so that she too was soon faced with foreclosure.²⁴ Both the subprime lender that sold the loan and Wells Fargo Bank, which quickly purchased it, failed to question the broker's loan documents containing contradictory statements about her income and personal details.²⁵ The Ohio Civil Rights Commission found the subprime lender had intentionally used race discrimination to sell this predatory loan.²⁶

The picture of the crisis looks different at the upper end, with Wall Street earnings at record highs in 2009²⁷ and soaring even higher in 2010.²⁸ The major banks whose high-risk, profit-making strategies were a vital cause of the crisis were its big winners.²⁹ For example, Goldman Sachs, a major beneficiary of federal bailouts, gave its employees an average compensation of over half a million dollars to reflect its record profits in 2009.³⁰

Especially staggering gains have been enjoyed by executives of the failed subprime institutions that sold the mortgages behind the foreclosure crisis. While Ameriquest (the largest subprime lender) collapsed, its owner Roland Arnall walked

20. JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 2 (2010).

21. Steve Schifferes, *Crisis "to Trap 53m in Poverty,"* BBC NEWS (Feb. 12, 2009), <http://news.bbc.co.uk/2/hi/7886334.stm> (reporting estimates by the World Bank of the effect on developing nations). See also Mahmud, *supra* note 3, at 4 (giving evidence of increased global unemployment and poverty due to the crisis).

22. HUDSON, *supra* note 6, at 214.

23. *Id.*

24. *Id.*; see also Mark Gillispie, *Ohio Civil Rights Commission Finds Bias in Argent Mortgage Lending*, Cleveland.com (Mar. 19, 2008), http://blog.cleveland.com/business/2008/03/ohio_civil_rights_commission_f.html.

25. HUDSON, *supra* note 6, at 214.

26. Gillispie, *supra* note 24.

27. HACKER AND PIERSON, *supra* note 20, at 1 (reporting that in 2009 the thirty eight biggest companies on Wall Street earned \$140 billion, the most ever recorded).

28. Liz Rappaport et al., *Wall Street Pay: A Record \$144 Billion*, WALL ST. J., Oct. 12, 2010, at C1.

29. JOHNSON & KWIAK, *supra* note 7, at 12.

30. *Id.* (citing Goldman Sachs's Oct. 15, 2009 Press Release reporting Third Quarter Earnings per Common Share of \$5.25).

away a billionaire.³¹ Arnall (who also held a network of related subprime companies, including one that sold the loan behind Elizabeth Redrick's foreclosure) had carefully structured his business empire to siphon off much of its profits into his personal accounts where they were protected from extensive public and private litigation.³² The CEO of Countrywide, another of the largest subprime lenders, was paid \$520 million from 2000 to 2008, and made large stock gains in the year before the company imploded.³³ Higher up the chain, the top five executives at Bear Stearns and Lehman Brothers cashed out a total of about \$2.4 billion in bonuses and equity sales (above their regular salaries) from each firm before their companies collapsed in 2008, giving them net "performance-based" gains totaling around a billion dollars for the period 2000-2008.³⁴ From 2000 until 2007, Lehman chief executive Richard S. Fuld received nearly a half a billion dollars in compensation³⁵—allowing him to walk away a rich man after bankrupting his company from its strategy of financing fraudulent and unsound subprime loans.³⁶

These results seem to reveal a picture of injustice that could hardly provide a clearer impetus for dramatic reform. Yet the theme of "unintended consequences" has emerged (along with a number of others) to muddy the view of the problems and solutions to the financial crisis so that inaction and acceptance seems reasonable and even wise.

II. GOOD IDEALS, BAD RESULTS

The phrase "unintended consequences" points to the difficulty of using law as a tool for beneficial social change.³⁷ The term became a common adage in the twentieth century, promoted in part by sociologist Robert Merton's 1936 essay, *The Unanticipated Consequences of Purposive Social Action*, which explained how systematic problems in human decision making confound our attempts to achieve desired outcomes.³⁸ The New Deal raised expectations that a national regulatory state could use law to control or prevent economic disaster and to increase economic security for the masses. Addressing both the law's transformative potential and its limits, many Twentieth Century advocates of legal realism turned to social science—

31. HUDSON, *supra* note 6, at 203, 252, 257.

32. *Id.* at 252.

33. John Gittelsohn, *Payback Time for Execs*, ORANGE CNTY REGISTER, Jan. 30, 2009, at § Bus. & Fin. News; Gretchen Morgenson, *Angelo Mozilo of Countrywide Settles Fraud Case for \$67.5 Million*, N.Y. TIMES, Oct. 16, 2010, at A1 (reporting that the S.E.C. found that Countrywide's CEO gained \$140 million in stock sales from 2006 to 2007).

34. See Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman, 2000-2008*, 27 YALE J. ON REG. 257, 270-71 (2010) (estimating Bear Stearns' top five executives' net non-salary gains at \$650 million and Lehman's top five executives' net non-salary gains at over \$400 million).

35. *Id.* at 70 (citing evidence from a 2008 Congressional committee hearing that Fuld earned \$490 million); James Sterngold, *How Much Did Lehman CEO Dick Fuld Really Make?* BLOOMBERG BUS. WEEK, Apr. 29, 2010 (reporting evidence from former Lehman attorney and whistleblower Oliver Budde that Fuld understated his earnings by failing to disclose stock sales that pushed his income above this level).

36. See *infra* text accompanying notes (discussing legal ruling protecting Lehman from paying damages to defrauded homeowners despite findings that Lehman knew of and assisted this fraud).

37. SHARYN L. ROACH ANLEU, LAW AND SOCIAL CHANGE (2010).

38. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936).

especially sociology—to push policy analysis beyond “law on the books” to a deeper understanding of the complications of “law in action.”³⁹

But by the end of the century, the term “unintended consequences” more strongly signaled declining faith in the twentieth century regulatory state and its welfare state policies. An entry for the phrase in the free-market oriented Liberty Fund’s Concise Encyclopedia of Economics explains that the term “most often . . . illuminates the perverse unanticipated effects of legislation and regulation.”⁴⁰ As this entry indicates, the phrase “unintended consequences” not only reminds us to consider a policy’s positive or negative “side effects,” but also further warns that a policy’s primary impact may be to perversely impede or undo its intended purpose. Cass Sunstein’s 1990 article *Paradoxes of the Regulatory State* is an example of how legal scholarship from a variety of political perspectives has thrived on detailing this kind of regulatory “pathology” and on suggesting more “flexible” and “market-oriented” solutions to these policy problems.⁴¹

As a shorthand to this problem of self-defeating law reforms, the phrase “unintended consequences” typically challenges policies aimed at promoting the public interest by controlling potentially harmful self-interested behavior. The term targets centrist, liberal, or progressive policies that purport to improve or cushion the harsh economic effects of private “market” behavior. The phrase suggests that policies intended to protect those at the bottom are particularly likely to fail and even to make things worse, further tilting the scales of justice against those not already at the top. If egalitarian policies have perversely harmful effects, then policies of upward redistribution can appear to be the best strategy even for those committed to egalitarian goals.

The term operates by pushing us to look beyond moral ideals to incentives.⁴² It draws on the logical assumption that proscriptions or penalties on certain self-interested behavior will induce people to adjust their behavior to achieve their self-interest in another way (assuming at least some individual freedom).⁴³ Regulating private self-interest to achieve the public interest does not simply and neatly redirect harmful private action towards public benefits, but instead may encourage different strategies of harmful private gain, which may well be even more destructive to the asserted public interest. Summing up this problem, Sunstein (who became Administrator of the Office of Information and Regulatory Affairs under President Obama), explained that:

[T]he world simply cannot be held constant after regulations have been issued. Strategic responses, the creation of perverse incentives for administrators and regulated entities, unanticipated changes in product mix and private choice—these are the hallmarks of the paradoxes of the regulatory state.⁴⁴

39. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE* (1995).

40. Rob Norton, *Unintended Consequences*, CONCISE ENCYCLOPEDIA OF ECONOMICS, (2d ed. 2008), available at <http://www.econlib.org/library/Enc/UnintendedConsequences.html>.

41. Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

42. See, e.g., N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS*, 7 (5th ed. 2009).

43. See Sunstein, *supra* note 41, at 413.

44. *Id.*

Classic examples of the “unintended consequences” story target regulation aimed at manipulating prices or otherwise regulating goods and services in order to protect those most vulnerable to harm in the existing “market.”⁴⁵ Rent control aims to make housing more affordable, but can lead private landlords to skimp on repairs or convert rentals to condominiums, thereby reducing the supply of good affordable housing. Minimum wage laws aim to raise income for workers, but can end up reducing a worker’s access to higher income if higher labor costs lead employers to replace workers with machines, to move to jurisdictions with no minimum wage laws, or to reduce investments that will lead to more job creation. Laws imposing safety requirements on consumer products may reduce safety if users see this increased protection as an opportunity to adopt riskier behavior, such as driving faster in cars with seat belts.⁴⁶ Environmental regulations aimed at limiting one type of pollution or conserving one resource may backfire by encouraging the substitution of one polluting practice for another more polluting practice of an endangered resource. Government spending to support people in poverty leads to more people in poverty because subsidies increase incentives for people to engage in whatever activity is subsidized.⁴⁷

But why should the term “unintended consequences” do so much to undermine policies aimed at supporting those disadvantaged within the existing political economy? The truism that good intentions can go awry can apply to any policy with a benign rationale. Questions of the substantive effects of policies are by nature contestable, complex, and dependent on perspective, context, and ideological presumptions. For example, whether the presence or absence of strong wage regulations helps or harms workers over the long run has received extensive theoretical and empirical analysis.

The “unintended consequences” theme gets its real power to defend inequality from its links to a bigger ideological story contrasting the imperfect results of public interested policy with the theoretically perfect aggregate welfare produced by a free market driven by the “invisible hand” of individual self-interest. The popular ideology of Ayn Rand takes the free-market story to an extreme by eschewing good intent: it righteously embraces self-serving gain as the objective source of truth and justice.⁴⁸ More generally, the term suggests an inevitable divide between moral aspirations and actual achievements, so that the very virtuousness of equality suggests policy failure in contrast to what then appears as the more modest but realistic social benefits of policies that accommodate rather than challenge “market” inequalities.

Indeed, the concept of “unintended consequences” helps repackage and revive the naturalized view of inequality embedded in much of the *Lochner*-era jurisprudence. The infamous 1905 *Lochner* decision⁴⁹ limited bottom-up regulations

45. See CHRISTOPHER DEMUTH, *Unintended Consequences and Intended Non-Consequences*, 10-13 (June 2009), available at <http://www.aei.org/speech/100056> (summarizing standard free-market economic arguments about perverse unintended consequences from liberal regulation).

46. See MANKIW, *supra* note 42, at 7.

47. See DeMuth, *supra* note 45, at 7-9; see also Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in FEMINISM CONFRONTS HOMO ECONOMICUS (Martha A. Fineman & Terence Dougherty eds., 2005) (criticizing this argument).

48. AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* (1964)

49. *Lochner v. New York*, 198 U.S. 45 (1905).

with a similar assumption that existing economic and political inequalities represent fundamental forces of nature outside the scope of public policy.⁵⁰ By ruling that wage and hour laws violated an individual's constitutional right to freedom of contract, the Supreme Court obscured the extensive background laws that impeded workers' power to contractually bargain for results beneficial to their interests.⁵¹

Most mainstream legal scholars reject the *Lochner*-era precept that an unequal political economy structured to deny workers' and consumers' power is fundamental to constitutional freedom, and instead adopt the post-New Deal theory that economic equality and security is a legitimate goal for legislative and executive action. But many still draw on *Lochner*'s essentialized notion of market freedom to make policy arguments against progressive regulation.

For example, in his 1993 article *Political Equality and Unintended Consequences*, Cass Sunstein argues that the Supreme Court turned back toward *Lochner* by treating unequal campaign spending as a fundamental freedom.⁵² But Sunstein relied on the "unintended consequences" theme to justify backing off from robust regulation of unequal power over elections. He explains that campaign spending regulations have in some ways enhanced elite influence, perverting the purported goal of furthering political equality. Sunstein notes that some forms of spending restrictions may particularly hurt challengers in their efforts to overcome the enormous advantages held by incumbents in the current system,⁵³ by encouraging other forms of problematic special interest spending or even secret gifts.⁵⁴ Reflecting on these possible results, he concludes with half-hearted support for "softer" alternatives such as limiting incentives for public financing, lamenting that any reform enacted by Congress deserves distrust due to the likelihood of self-dealing.⁵⁵

Sunstein's analysis shows how, on the surface, the concept of unintended consequences seems consistent with critical legal scholarship's understanding of the politics of law. Like critical legal scholarship, the idea of unintended consequences challenges liberalism's faith in law's ability to constrain power with normative principles. Law remains the master's tool, as LatCrit theory reminds us,⁵⁶ so that law reforms appearing to dismantle the master's house will in fact end up fortifying it.

But the concept of unintended consequences subtly helps divert and confuse that critical analysis of the relationship between law and power. Influential centrist and liberal legal scholars (like Sunstein) have often invoked the concept of unintended consequences to justify a more cautious and accommodating approach to regulation in a variety of legal subject areas. Indeed, this widespread retreat from intellectual support for aggressive regulatory controls helped encourage and legitimate the financial deregulation that created the conditions for the recent crisis.

50. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 40, 67 (1993); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

51. *Lochner*, 198 U.S. at 53.

52. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1993).

53. *Id.* at 1400, 1401.

54. *Id.* at 1407-10.

55. *Id.* at 1411-14.

56. Leslie Espinoza, *A Vision Towards Liberation*, 19 CHICANO-LATINO L. REV. 193 (1998) (citing Audre Lorde, *The Masters Tools Will Never Dismantle the Master's House*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 98-100 (Cherrie Moraga & Gloria Anzaldua eds., 1981)).

By rationalizing the surrender to unequal and destructive powers as a more sophisticated and legitimate approach to justice, rather than as a failure of justice, the prevailing “unintended consequences” story can increase the power to turn law’s good intentions into bad results.

Unlike a critical understanding of the politics of law, the “unintended consequences” theme points back to *Lochner* by reifying and even legitimating the top-heavy power that undermines bottom-up policies. Even when it stops short of *Lochner*’s constitutionalization of that power, the story of “unintended consequences” deflects attempts to explore and change the legal ground on which that power depends. The master’s tools include not just law but the ideology that law is powerless to disrupt a naturalized order of inequality outside of law.

III. RETELLING THE STORY OF LAW’S BAD RESULTS

How, then, can we take apart the concept of “unintended consequences” as part of a step toward an ideological retooling of law to better resist the upward transfer of resources, in the current crisis and beyond? A number of critical questions can help uncover how the term hides the role of law and human design in producing and maintaining the power relations that appear to constrain law’s capacity for broad, beneficial results. Using the financial crisis as an example, these questions unravel the surface concern of avoiding harmful effects to show the underlying support for that harm.

First, we should ask how the “unintended consequences” framework steers analysis away from the interests and values of those who gain from harmful policies, so that the harm appears to arise from an inevitably challenging and uncertain technical puzzle or a tragic accident of nature, rather than from the wrongful or careless exercise of power. Second, we should ask how the theme of “unintended consequences” implicitly rehabilitates what would otherwise be illegitimate action. Third, we should examine how the “unintended consequences” story tends to legitimize harm by presumptively directing blame to the victims. By obscuring the agency of those who gain from harmful results, the story of “unintended consequences” directs attention to the power and responsibility of those who bear the harm. Fourth, we should ask how explaining harm as “unintended consequences” averts rigorous analysis of alternative policies that might produce less harm and more egalitarian results. The “unintended consequences” message tends to attribute bad effects to the general powerlessness of law in the face of uncertainty and complexity, rather than to the foreseeable power of particular policy choices to lead to harm.

A. *What Contested Ideologies and Interests Hide Beneath “Unintended Consequences”?*

First, critical analysis should ask how descriptions of “unintended consequences” tend to obscure conflicts about moral and political *intent*. By calling harmful results “unintended,” the phrase suggests a happy consensus about the public interest that runs into unfortunate technical glitches when implemented.

Consider how the phrase was used by former Senate Banking Committee Chair and now bank executive Phil Gramm, leading sponsor of laws easing restrictions on the financial industry. As the financial markets unraveled in 2008,

many pointed fingers at Gramm, labeling him “the father of the financial crisis.”⁵⁷ Gramm defended his legacy of financial industry deregulation by explaining that the economic crisis largely resulted from the “unintended consequences” of the prevailing monetary policy—the Federal Reserve’s low interest rates—that worked well to regulate normal business inventory cycles, but failed in the face of the distinctive speculative housing bubble of the early 2000s.⁵⁸

This term invokes a plausible picture of a complex economy rife with uncertainty that can easily trip up well-meaning experts as they sift through evidence of the market’s ups-and-downs to decipher the economic future. Gramm goes on to also blame the crisis on policies supporting equality in lending and housing, following the standard storyline targeting progressive policy as particularly perverse.⁵⁹ Nonetheless, by first using the term against the presumably bipartisan, technocratic, and market-oriented monetary policy, Gramm’s analysis appears to be a relatively nonpolitical observation about the inherent risks in even the most modest and accommodating attempts by government to steer the market in the public interest.

But Gramm’s use of the term masks how the inevitably imperfect technical calculations that comprise monetary policy are embedded in a broader normative vision of political and economic well-being. During his much-celebrated reign, Federal Reserve Chair Alan Greenspan designed his policies to foster upward redistribution, systematically controlling interest rates to favor capital over labor, creditors over debtors, and financial speculation over the real economy, as journalist William Greider has explained.⁶⁰ Greenspan’s policies supported financial asset bubbles that created fabulous and highly concentrated wealth, despite high risks to the middle class and to the stability of the system as a whole.⁶¹ The policy of cheap money in the early 2000s, for example, did not support general business investment, gains in median household income, or other measures of broad economic growth, but instead mainly inflated housing prices and the returns on high-risk mortgage-backed securities.⁶² Though Greenspan personally may not have been motivated by conscious animosity or an overt desire to harm most Americans, his words and actions reflect intent to privilege financial market gains over other measures of well-being, and to ignore the substantial evidence of the speculative, unequal, exploitative, unstable, and even fraudulent nature of much of those gains.⁶³ When policies based on this fundamentalist faith in financial market gains did indeed lead

57. Paul Krugman, *The Gramm Connection*, N.Y. TIMES (Mar. 29, 2008), <http://krugman.blogs.nytimes.com/2008/03/29/the-gramm-connection/>.

58. Phil Gramm, *Deregulation and the Financial Panic*, WALL ST. J., Feb. 20, 2009, at A17, available at <http://online.wsj.com/article/SB123509667125829243.html>. See also DeMuth, *supra* note 45, at 4 (explaining Gramm’s comment as a criticism of Greenspan’s policy response to the high-tech stock bubble).

59. Gramm, *supra* note 58.

60. William Greider, *The One-Eyed Chairman*, THE NATION (Sept. 1, 2005), <http://www.thenation.com/article/one-eyed-chairman>.

61. WILLIAM A. FLECKENSTEIN, GREENSPAN’S BUBBLES: THE AGE OF IGNORANCE AT THE FEDERAL RESERVE 5 (2008).

62. JOHNSON & KWIAK, *supra* note 7, at 147.

63. See, e.g., FLECKENSTEIN, *supra* note 61, at 31-35, 62, 66-70 (describing how Greenspan ignored evidence of financial market bubbles, instead taking on faith that market gains reflected mysterious real productivity that followed new economic rules); HUDSON, *supra* note 6, at 247; DEAN BAKER, FALSE PROFITS: RECOVERING FROM THE BUBBLE ECONOMY 1-7 (2010).

to enormous short-term returns to many in the financial industry, with devastating longer-term harm to ordinary investors, businesses, consumers, and workers generally, the label “unintended” understates the impact of this upward-oriented ideology.

Choices about what consequences and what economic measures to value in setting monetary policy are not self-evident or value-neutral. A very different ideology guided the Federal Reserve’s policy in the mid-twentieth century, as Timothy Canova has analyzed.⁶⁴ During that time, the Fed’s policies followed a more egalitarian vision, promoting full employment along with stable and strong growth, by combining low-interest rates with strong financial market controls.⁶⁵ This alternative approach to monetary policy was institutionalized through legal rules, making the Fed more transparent and accountable to ordinary Americans.⁶⁶ Gramm’s comment reveals how the term “unintended consequences” ignores this history by attributing the financial crisis problems to an unpredictably changing economy, rather than to a changing ideology that valued gains to Wall Street over investments in “Main Street” business.⁶⁷

In questioning the contested values underlying descriptions of “unintended consequences,” critical analysis requires that we ask where those values get their power. By deflecting attention from political agency, the label “unintended consequences” obscures the self-interested purposes of those with the most power to influence historical and cultural change.

In particular, former Senator Gramm was “not just present, but an active participant” in the ideological shift that redirected economic policy to embrace a top-down vision, as Jacob Hacker and Paul Pierson note in explaining the crisis’s roots in a political movement that purposefully pushed for upward redistribution.⁶⁸ Hacker and Pierson identify Gramm along with Greenspan as perhaps the two most powerful advocates of that movement.⁶⁹ In over two decades in Congress, Gramm devoted his legal reform efforts to enshrining Wall Street’s position as what he called a “holy place, rejecting regulations against predatory lending by insisting that the subprime industry was the ‘American dream in action.’”⁷⁰ Working closely with Greenspan, Gramm masterminded the 1999 Financial Services Modernization Act (also known as the Gramm-Leach-Bliley Act) repealing New Deal protections against systemic risk,⁷¹ and the enactment of the Commodity Futures Modernization Act of 2000, which allowed the growth of derivatives and other risky financial practices during the subsequent bubble.⁷²

As part of this movement, Gramm was a prominent supporter not just of

64. Timothy A. Canova, *The Federal Reserve We Need*, AMERICAN PROSPECT (Oct. 11, 2010), available at http://prospect.org/cs/articles?article=the_federal_reserve_we_need.

65. *Id.*

66. *Id.*

67. JOHNSON AND KWAK, *supra* note, at 31, 147 (explaining how low interest rates in the 1930s combined with lack of controls on speculative and highly leveraged financial risk-taking fueled the Great Depression and how the low interest rate policies of the 2000s channeled capital into speculation rather than meaningful economic growth).

68. HACKER AND PIERSON, *supra* note 20, at 196 (2010).

69. *Id.* at 197.

70. *Id.* at 197-198.

71. Pub. L. No. 106-102, 113 Stat. 1338 (repealing part of the 1933 Glass-Steagall Act).

72. HACKER & PIERSON, *supra* note 20, at 197.

financial deregulation but also of Federal Reserve Chairman Greenspan's monetary policy, defending him against critics as an "oracle" and as "the greatest banker of the century."⁷³ In an adulating review by the Senate Banking Committee of Greenspan's qualifications for another term in 2000, Gramm put Greenspan at the "top of the list" of those deserving credit for producing an economic "golden age."⁷⁴

The ideological leadership epitomized by Gramm and Greenspan reflects more than an abstract concern with economic principles and public well-being. The rising political interest in financial market deregulation directly correlated with rising financial industry political contributions, making that sector the largest source of political funds during the 1990s and 2000s.⁷⁵ One analysis calculated that the financial industry spent \$1.7 billion on campaign contributions from 1998 to 2008, and \$3.4 billion on lobbying.⁷⁶ Gramm received more campaign contributions from commercial banks than anyone else in Congress from 1989 to 2002, and he was among the top five recipients of funding from Wall Street interests in general.⁷⁷ As Chair of the Senate Banking Committee, Gramm raised twice the amount of money from the securities industry than from any other sector.⁷⁸ When Gramm left Congress in 2003, he became a vice chair and lobbyist for the largest Swiss bank, USB, which reaped substantial profits during the financial market bubble of the early 2000s not only by structuring subprime securities, but also by facilitating widespread tax evasion for wealthy Americans; this company also went on to receive a massive bailout from the Swiss government when the bubble collapsed in 2008.⁷⁹ Gramm's wife received a lucrative position on Enron's corporate board a few weeks after she used her position as Chair of the Commodity Futures Trading Commission to alter federal regulations to ease federal control over Enron's energy futures contracts and others, smoothing the way for the deception that led to that company's collapse.⁸⁰

The fact that the financial industry spent so lavishly to advance its political and financial policies suggests that financial executives and politicians, rather than trusting in a ready consensus, understood that their political vision would have to overcome competing interests and contrary facts. Gramm stands out as particularly disingenuous in his use of the phrase "unintended consequences" to describe the policies that not only enriched him personally but that generated extensive evidence of harm that he actively and persistently denied. Faced with looming evidence of disaster in the summer of 2008, Gramm (then a top advisor to Republican John McCain's presidential campaign) publicly dismissed this evidence as unjustified whining, insisting that the economy had never been better.⁸¹

73. FREDERICK J SHEEHAN, PANDERER TO POWER: THE UNTOLD STORY OF HOW ALAN GREENSPAN ENRICHED WALL ST AND LEFT A LEGACY OF RECESSION 245, n. 31 (2010).

74. *Id.* at 243.

75. JOHNSON & KWIAK, *supra* note 7, at 90-91.

76. *Id.* at 91 (citing Essential Information & Consumer Education Foundation, *Sold Out: How Wall St. and Washington Betrayed America* (Mar. 2009), <http://www.wallstreetwatch.org>.)

77. HACKER & PIERSON, *supra* note 20, at 198.

78. JOHNSON & KWIAK, *supra* note 7, at 91.

79. HACKER & PIERSON, *supra* note 20, at 198.

80. *Id.*

81. *Id.* at 196.

B. *What Intentional Wrongdoing Does "Unintended Consequences" Excuse?*

The phrase "unintended consequences" not only puts an innocent face on policies of harmful *results*, but also helps excuse intentional disregard of the harmful *intent* behind these policies. Christopher DeMuth, longtime president of the conservative American Enterprise Institute, explains that the term puts a polite veneer over American policy debates by evading questions of motivation and by maintaining the fiction that harmful actions are unfortunate mistakes among "gentlemen" dedicated to the public good.⁸² Describing policy failures as "unintended consequences" can serve to legitimate policies grounded not only in bias, self-dealing, or callous disregard, but also actual law breaking, particularly by the relatively powerful.

The term sweeps a wide range of wrongdoing under the general cover of self-interested behavior. For example, Sunstein attributes "futile or self-defeating" regulations to the problem that "mandates and bans invite efforts at circumvention," inducing "adaptation" by those regulated or by the regulators.⁸³ This description begs the crucial question of the substance of this strategic behavior: for instance, whether a ban on unsafe products leads a business to devote its resources to safety innovations rather than (for instance) to aggressive legal defense tactics, or to systemic deception about its products' safety, or to lobbying for regulatory loopholes, or even to helping managers and investors use insider trading and foreign banks to stash their gains before problems emerge. Sunstein's description makes unethical and illegal behavior seem to be the normal and necessary result of vague but scientific "incentive effects," with terms like "adaptation" suggesting a naturalistic process of evolution outside of individual control. Furthermore, this view suggests that resistance to law is reflexively determined by the strength of the regulatory command, creating a catch-22 in which policies aiming for the most control on wrongdoing seem inevitably to risk the greatest harm.

The "unintended consequences" story tends to not only accept elite wrongdoing as routine or inevitable but to reconstruct that wrongdoing as beneficial. Sunstein describes as "creative" those who strategically respond to regulatory controls with new harmful behavior.⁸⁴ This puts a positive spin on resistance to law by linking it to normal or even ideal market self-interest maximizing. Echoing *Lochner's* reasoning legitimating employers' potentially coercive and exploitative legal power as inherent market "freedom," such descriptions tend to diffuse debate about wrongdoing with a presumption of admirable innovation and entrepreneurial risk-taking.

By facilitating this slippage between illegality and superior market productivity, the "unintended consequences" story helps fuel the harmful consequences it purports to analyze. The recent crisis, and its upwardly redistributive impact, are the consequences of an explicit shift throughout many levels of government and business toward policies aimed at overlooking, accepting, or even embracing fraud, theft, and other illegal or generally destructive forms of economic

82. DeMuth, *supra* note 45, at 3-4.

83. Sunstein, *supra* note 52, at 1411.

84. *Id.*

gain.

By 2004, the FBI warned of a fraud "epidemic" perpetrated by mortgage lenders.⁸⁵ In his investigation of the subprime mortgage industry, journalist Michael Hudson compiled numerous examples of how executives of leading mortgage companies implemented business plans that relied on the deception and coercion of homeowners.⁸⁶ For example, subprime companies designed staff hiring policies, staff trainings, and employee rewards to promote sales practices centered on misleading homeowners about the costs and amount of their loans.⁸⁷ Managers strategically cultivated low moral standards and conformism among staff by encouraging and supporting a workplace culture of alcohol and drug use, bullying, and race and gender discrimination.⁸⁸

One loan officer summed up his work as theft: using lies and evasion to sell subprime loans primarily to consumers who qualified for much cheaper prime rates.⁸⁹ A loan officer for Ameriquest (the largest subprime lender) explained that "every closing" amounted to a "bait and switch" operation because the loans were so overpriced and irrational that dishonest sales were the only way to get customers.⁹⁰ Ameriquest and other subprime companies relied on practices such as forging and altering loan documents, manipulating or falsifying appraisals, and denying borrowers access to required disclosures of fees and loan amounts.⁹¹ Employees and managers who attempted to stop such practices were routinely ignored, overruled, penalized, or fired.⁹² These illegal tactics, and the cover-up strategies needed to sustain them, sometimes allegedly even included bribery, sex, and violence.⁹³ Sales staff and managers who joined in this culture of fraud were rewarded with lavish commissions and perks (such as luxury cars and vacations at elite resorts) designed to hook sales staff into upper-class aspirations only sustainable through further illegal and unethical actions.⁹⁴

This systemic wrongdoing particularly operated to take assets from those

85. William K. Black, *The Two Documents Everyone Should Read to Better Understand the Crisis*, HUFFINGTON POST (July 1, 2009), http://www.huffingtonpost.com/william-k-black/the-two-documents-everyon_b_169813.html.

86. See, e.g., HUDSON, *supra* note 6, at 237, 266-67, 273 (discussing evidence uncovered by state investigations of Ameriquest, testimony to state investigators by CEO of holding companies related to Ameriquest, and evidence of fraud in 70% of the mortgages issued by Aurora Loan Services, and that a manager installed by Lehman stormed out of an investigative meeting yelling, "Your people find too much fraud").

87. HUDSON, *supra* note 6 at, 153-157.

88. HUDSON, *supra* note 6, at 80, 160, 219-220 (discussing charges of race discrimination against First Alliance Mortgage Company, culture of "racism, sexism, and callousness" at Ameriquest, along with widespread cocaine use among managers and company events featuring strippers and illegal drugs, and use of sexual harassment to punish employees complaining about fraud at the subprime lender BNC, financed by Lehman).

89. *Id.* at 113 (quoting Greg Walling, a loan salesman for First Alliance Mortgage Company (FAMCO)).

90. *Id.* at 3.

91. *Id.* at 1-3, 64, 156-57, 162-64, 218-19, 223, 232-34.

92. See *id.* at 65, 113, 234-35, 237.

93. *Id.* at 84, 204-06 (discussing litigation claims that First Alliance Mortgage Company hired thugs to severely injure a consumer attorney and bribed his clients after he filed a class action for fraud against the lender, and subprime lending saleswomen trading sex to brokers for steering borrowers to their high cost loans, and use of sexual harassment against employees who reported fraud).

94. *Id.* at 97-98.

near the bottom or those teetering on the edge of the middle class, making the harm of the illegal behavior especially devastating. The subprime industry targeted its fraudulent practices to indebted homeowners whose economic struggles were exacerbated by a combination of factors such as: illness, personal trauma, job loss, divorce, advanced age, mental and physical disability, language barriers, race, and gender. Subprime lenders understood that these customers would have the least power and resources to bargain for a fair deal, or to seek other alternatives once they suspected that they had been deceived.⁹⁵ Further, subprime lenders capitalized on the harmful results of their own fraud, marketing additional refinancing to customers at risk of default on the mortgages such borrowers had recently bought, thereby extracting additional fees while pushing homeowners into a downward spiral of unpayable debt.⁹⁶

This upwardly “redistributive” wrongdoing was not just a problem of rogue practices by the shady subprime industry, but instead was at the core of the mainstream financial industry’s booming profits. Leading financial firms, along with rating agencies, investors, and regulators, embraced securitized subprime mortgages, and the related risk-spreading instruments that made those securities appear viable, as an innovative plan for high returns (and high fees) with minimal risk.⁹⁷ The growth of the subprime business would have been impossible without a pipeline of outside funding from large investment banks, since the mortgages largely were designed as a Ponzi scheme to generate profits from short-term fees and interest from unsound loans that could only be paid off through the sale of even more unsound mortgages or from ever-increasing home values.⁹⁸ Without securitization and related financial “innovations” that could churn these unsound mortgages into the appearance of viable investments, the subprime business would soon have collapsed from borrower defaults and lawsuits.⁹⁹

Wall Street firms not only took advantage of shady subprime lending, but actively led the subprime business into further unsound practices. New York Times business reporter Joe Nocera points to correspondence from a Wall Street financial firm urging a subprime mortgage seller to reduce its credit score cutoff, explaining that its funders wanted its business tactics to be “as bad as” its competitors.¹⁰⁰ One state lawmaker summed up the system as a grand money laundering operation.¹⁰¹ Former banking regulator and legal expert on financial fraud William K. Black explains that Lehman knew fraudulent loans were its principal source of (fictional)

95. *Id.* at 87-89.

96. *See id.* at 244 (reporting one in nine loans made by Ameriquest in 2004 was to refinance its own loans less than two years old).

97. JOHNSON & KWIAK, *supra* note 7, at 123-24.

98. *See, e.g.,* HUDSON, *supra* note 6, at 196.

99. *See* Kurt Eggert, *The Great Collapse: How Securitization Caused the Great Mortgage Meltdown*, 41 CONN. L. REV. 1257, 1310-11 (2009); Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall St. Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 (2007) (explaining how securitization harms borrowers by creating financial industry incentives to promote high cost and unsound lending).

100. Joe Nocera on “All the Devils Are Here: The Hidden History of the Financial Crisis,” DEMOCRACY NOW (Nov. 23, 2010), http://www.democracynow.org/2010/11/23/joe_nocera_on_all_the_devils (interviewing Nocera, a reporter at the New York Times and author of book on the crisis).

101. HUDSON, *supra* note 6, at 174 (quoting Georgia state senator Vincent Fort).

income, and that it dealt with the associated risks by strategically increasing the volume of this fraudulent lending and then engaging in extensive accounting fraud to (temporarily) drive up its stated profits (and executive compensation) to record heights.¹⁰² A Citibank senior vice president testified that in 2006 he realized that about 60% of the supposedly prime mortgages that Citibank was selling to Freddie Mac, Fannie Mae, and other investors did not comply with stated underwriting standards, but that despite many warnings, Citibank's management increased those "defective" loans to 80% of its business.¹⁰³ Goldman Sachs agreed to a \$550 million settlement for a civil fraud case charging it had sold subprime mortgage investments designed to fail.¹⁰⁴ By the end of 2010, the only prominent executive who was personally penalized for fraud was the CEO of Countrywide, who settled a civil fraud case by the Securities and Exchange Commission for \$67.5 million.¹⁰⁵ No criminal charges have been brought against any mortgage lender or financial industry executive for the systemic fraud behind the crisis.¹⁰⁶

In a 2003 ruling, a federal trial court found "significant, active and knowing participation" by Lehman Brothers in the fraudulent practices of one of its major subprime lenders.¹⁰⁷ This lender had followed the typical subprime business pattern of filing for bankruptcy after its executives had skimmed off the company's assets.¹⁰⁸ When the United States Court of Appeals for the Ninth Circuit affirmed the trial court's finding that Lehman had actual knowledge of lender fraud and substantially assisted these fraudulent practices, the judges rejected Lehman's attempted distinction between supporting the subprime business and supporting its particular acts of fraud, concluding the distinction is meaningless if that "whole business is built like a house of cards on a fraudulent enterprise."¹⁰⁹ Nonetheless, the court interpreted punitive damage and bankruptcy laws to protect Lehman from substantial legal responsibility for compensating defrauded borrowers.¹¹⁰

By portraying this disregard for legality as a universal "adaptation" to incentives by naturally self-interested individuals, the "unintended consequences" story of law's failure evades analysis of the specific legal rules that create and sustain incentives for illegality—and the contingent choices individuals, legal experts, and business organizations make in response to those incentives. When

102. Black, *Statement on Lehman Bankruptcy*, *supra* note 5, at 5-12; *see also* Black, *supra* note 85 (discussing how financial firms knowingly targeted fraudulent loans to provide near-certain executive enrichment from (fictional) gains).

103. Hearing on Subprime Lending and Securitization and Government Sponsored Enterprises, Hearing before the Financial Crisis Inquiry Commission (April 7, 2010) (statement of Richard M. Bowen, III).

104. Zachary A. Goldfarb, *Goldman Sachs to Pay Record Settlement in Fraud Suit, Change Business Practices*, WASH. POST (July 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071505111.html>.

105. Morgenson, *supra* note 33.

106. Jesse Eisinger, *The Feds Stage a Sideshow, While the Big Tent Sits Empty*, N.Y. TIMES (Dec. 8, 2010), <http://dealbook.nytimes.com/2010/12/08/where-are-the-financial-crisis-prosecutions/> (arguing that the civil settlement represents further lax treatment of elite financial fraud).

107. *Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977 (9th Cir. 2006).

108. HUDSON, *supra* note 6, at 139 (noting that from 1998 to 2000, most of the largest subprime lenders went bankrupt, though many soon regrouped under different names to repeat the practice).

109. *Henry*, 471 F.3d at 995.

110. HUDSON, *supra* note 6, at 197-98, 299; *Henry*, 471 F.3d at 989, 999.

former Senator Phil Gramm used the term to politely shift blame for the crisis to Greenspan's low interest rates, he not only obscured the contested intent of that monetary policy but also how that policy (like those at the ground level of the subprime market) was explicitly designed to reconstruct, permit and even subsidize questionable financial market activity as productive "innovation."¹¹¹ Greenspan (like Gramm) repeatedly dismissed evidence that the subprime market was rife with fraud, insisting that deception was too fuzzy a concept to be the basis of law and actively leading efforts to dismantle and block regulatory efforts.¹¹²

Even when bemoaning the fraud in hindsight, experts commenting on the crisis nonetheless continue to invoke the idea of "unintended consequences" to shift responsibility for this fraud away from those who used it as a strategy for gain and to justify maintaining the policies that enabled it. Judge Richard Posner focused blame for the crisis on regulators who were "asleep at the switch,"¹¹³ but he excused financial industry wrongdoing as rational self-interest maximizing that was induced by lax regulations.¹¹⁴ Following the circular logic of the "unintended consequences" story, Posner then argued against substantially tightening regulatory systems to address this failure, on the theory that such changes are unlikely to be successful given the history of powerful industry efforts to capture regulators and to weaken enforcement.¹¹⁵

Attributing the systemic fraud driving the crisis to a historical "regulatory failure" naturalizes and legitimates this system of upwardly redistributive wrongdoing by essentializing it as an inherent and universal feature of politics and law. To the contrary, law professor and former bank regulator William Black explains that federal agencies' pervasive refusal to enforce laws against the endemic fraud underlying the crisis was not normal politics, inherent human fallibility, or the result of inevitable incentives for economic gain.¹¹⁶ Instead, this regulatory weakness was an intentional policy change, overtly rationalized by a particular ideology consciously promoted not just by some regulators and self-serving industry interests but also by a din of academics and public intellectuals like Posner who endlessly warned of the harmful "unintended consequences" of regulatory controls compared to "market incentives."

Specific policy changes weakening regulation of financial fraud included federal law reforms easing restrictions on highly leveraged activity, federal preemption of state predatory lending controls, reduced federal resources for financial fraud enforcement, and an overall enforcement strategy favoring favored voluntary agreements or "flexible" settlement decrees that deferred to industry judgment.¹¹⁷ In particular, the Federal Reserve repeatedly rejected expert advice and

111. See JOHNSON & KWIAK, *supra* note 7, at 104-109 (discussing the ideology of finance promoted by Greenspan and others).

112. HUDSON, *supra* note 6, at 247; see also JOHNSON & KWIAK, *supra* note 7, at 142-43.

113. RICHARD A. POSNER, A CRISIS IN CAPITALIST DEMOCRACY 167 (2010).

114. Richard Posner, *The Financial Regulation Law—Posner's Comment*, The Becker-Posner Blog (July 11, 2010, 4:10 pm), <http://www.becker-posner-blog.com/2010/07/index.html>.

115. POSNER, *supra* note 113, at 262.

116. See Black, *supra* note 85 (discussing how the Federal Reserve in particular has led an ideological and policy movement to weaken regulation designed to minimize fraud).

117. See, e.g., JOHNSON & KWIAK, *supra* note 7, at 137-42 (discussing changes in financial regulatory policy); HUDSON, *supra* note 6, at 93 (describing Justice Department Attorney Deval Patrick's comments about the "flexible" settlement of race discrimination charges against a leading mortgage

empirical evidence of rampant wrongdoing in the subprime market, particularly affecting minority and low-income communities, and expressly refused to use its power to protect consumers rather than elite financiers.¹¹⁸ As Senate Banking Committee Chair, Gramm refused to hold hearings on predatory lending legislation, and similarly blocked regulations that would have restricted conflicts of interests in accounting firms involved in securities deals.¹¹⁹

These policy changes were supported by an ideology of market fundamentalism based on faith that uncontrolled self-interest of powerful business owners and managers would naturally benefit society.¹²⁰ In part, this ideology promotes the idea that the deregulated market's "invisible hand" will better control fraud, race discrimination, and other economic behavior harmful to overall welfare.¹²¹ This view tends to dismiss the extensive evidence to the contrary by insisting that deceptively opaque and highly unequal gain amounts to innovative production that will push beneficial economic growth to new heights. Greenspan, for example, joined the subprime mortgage industry's leaders in celebrating the growth of that market as an innovative way to expand beneficial credit to underserved groups.¹²² He similarly praised the growth of mortgage securitization and the related interdependent derivatives market as an "extraordinarily useful vehicle" for transferring risk to those who can productively gain from it, despite evidence that this risk-spreading would likely increase widespread instability and deceive investors.¹²³ Against the strong criticism of this ideology from some political leaders, regulators, consumer advocates, and scholars, Greenspan explained that even if this financial "innovation" was suspect, stopping any bad behavior would be impossible without interfering with beneficial economic growth.¹²⁴ Legal scholars also were an important part of the chorus urging regulatory restraint as a means of fueling beneficial innovation.¹²⁵

The crisis has even appeared to give new power to the ideology that elite financial gains must take precedence over consumer well-being. After the risks had materialized into a global crisis in 2009, Ben Bernanke, who succeeded Greenspan as Federal Reserve Chair, cautioned against burdening lenders with new regulations on the theory that encouraging financial "innovation" will increase access to affordable credit.¹²⁶ In late 2010, as Republican Senator Spencer Bachus prepared to

company in 1996).

118. JOHNSON & KWIAK, *supra* note 7, at 142.

119. HACKER AND PIERSON, *supra* note 20, at 197.

120. HUDSON, *supra* note 6, at 43 (quoting Greenspan).

121. *Id.* at 43, 167 (discussing how Greenspan promoted the theory that businesses' interest in an honest reputation will defeat temptations for quick profits at the expense of consumers and the prominence of this view in the administration of George W. Bush); JOHNSON & KWIAK, *supra* note 7, at 103 (discussing how Greenspan's ideology of market perfection led to his insistence that financial fraud was unnecessary and the growth of derivatives was proof of their social benefits).

122. JOHNSON & KWIAK, *supra* note 7, at 112, 143.

123. *Id.* at 102-103, 106 (discussing how Greenspan's ideology influenced numerous policies shaped by the Federal Reserve and Greenspan's views on mortgage securitization); Peter S. Goodman, *Taking Hard New Look at Greenspan Legacy*, N.Y. TIMES (Oct. 9, 2008), at A1 (quoting Greenspan's praise for the unregulated growth in derivatives).

124. Goodman, *supra* note 122.

125. See, e.g., Ziwicki, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 2-3 (2009).

126. JOHNSON & KWIAK, *supra* note 7, at 107 (citing Ben S. Bernanke, *Financial Innovation*

become the new chair of the Senate Banking Committee, he notoriously commented that regulators should serve banks, not regulate them.¹²⁷ Though he later backtracked by saying that he meant he would not “micromanage” the banks,¹²⁸ his history as chief Republican negotiator for the 2008 financial industry bailouts (and his career supported by over \$1 million in bank campaign contributions)¹²⁹ suggests a “macro” approach consistent with a vision of service over regulation. Revealing how “deregulation” rhetoric slides into rationalizations for an ideology of unequal law, Congressman Ron Paul affirmed Bachus’s comments by urging that bank regulators be replaced with a market where “law and order” requires people to fulfill their contracts.¹³⁰

In the prevailing ideology, strict regulatory supervision and strong penalties for wrongdoing are a sign of outdated, naive, and rigid bureaucracy. Instead, the dominant view presents a more forgiving and “flexible” approach to regulation as not only more practical and realistic but also as bold, exciting, and sophisticated. In this context, elite financial activity that crosses the line into illegality can be portrayed as “cool” and even “sexy” creativity.¹³¹ In contrast, when those at the bottom skirt the law for economic gain, their behavior is increasingly criminalized as irredeemably destructive. Note, for example, the strict moralism used to condemn undocumented immigrants in the popular slogan “What Part of Illegal Don’t You Understand,” despite substantial evidence that unauthorized migration can produce broadly distributive and lasting economic gains. In contrast, “undocumented” loans in the subprime boom were widely characterized as financial market “innovation” rather than illegality.¹³² A similar double standard has been advanced by legal scholars and commentators who oppose efforts to modify homeowners’ mortgage debt to avoid foreclosure and resulting socioeconomic harm, arguing that changing these contractual obligations will undermine respect for the rule of law.¹³³

Recent evidence shows that rampant creditor illegality continues in the foreclosure process that was left in the wake of the real estate bust. Unregulated

and Consumer Protection (Apr. 17, 2009), <http://www.federalreserve.gov/newsevents/speech/bernanke20090417a.htm>.

127. Mary Orndorff, *Sen. Bachus Finally Gets his Chairmanship*, THE BIRMINGHAM NEWS (Dec. 9, 2010), http://blog.al.com/sweethome/2010/12/spencer_bachus_finally_gets_hi.html.

128. Jay Fitzgerald, *Frank Lays Into Successor*, BOSTON HERALD, Dec. 16, 2010, § Bus., at 29 (reporting that Democratic Rep. Barney Frank dismissed this “clarification,” citing Bachus’s policies opposing regulation protecting consumers).

129. See Press Release, Democratic Congressional Campaign Committee, Big Bank Bachus Thinks Government Exists to ‘Serve The Banks’ (Dec. 13, 2010), *available at* http://dccc.org/newsroom/entry/big_bank_bachus_thinks_government_exists_to_serve_the_banks/.

130. Real Time Economics, *Ron Paul: I Don’t Think We Need Regulators*, WALL ST. J. BLOGS (Dec. 17, 2010, 3:07 PM), <http://blogs.wsj.com/economics/2010/12/17/ron-paul-i-dont-think-we-need-regulators/>.

131. JOHNSON & KWIAK, *supra* note 7, at 113 (noting that this ideology was reinforced by popular representations of Wall Street greed as “cool, seductive, and even sexy”).

132. See Kevin Johnson, *What Part of “Illegal” Don’t You Understand? One Response: What About Rational Dialogue and Reasonable Debate Don’t YOU Understand?*, IMMIGRATIONPROF BLOG (Oct. 28, 2007), <http://lawprofessors.typepad.com/immigration/2007/10/what-part-of-il.html> (noting and criticizing the use of this phrase to advocate for the criminalization of economic migration).

133. See, e.g., Alvin C. Herrell, *The Great Credit Contraction: Who, What, When, Where, and Why*, 26 GA. ST. U. L. REV. 1209, 1255-1257 (2010); Judge H. Lee Sarokin, *Does the Defense of Foreclosures by Lawyers Border on the Unethical?*, HUFFINGTON POST (Nov. 22, 2010), http://www.huffingtonpost.com/judge-h-lee-sarokin/does-the-defense-of-forec_b_787027.html.

mortgage servicing subcontractors typically can reap short-term gains by using fraud, robo-signing, and other illegal practices that increase foreclosures and avoid beneficial loan modifications, thereby leading to long-term losses for both borrowers and lenders and for the broader economy.¹³⁴ Although state governments have taken steps to prosecute this fraud and to suspend the foreclosure process,¹³⁵ federal government leaders of both major parties have refused or have ignored numerous proposals to stem these continuing illegal financial practices. For example, Treasury Secretary Timothy Geithner has prohibited states from using the 2008 federal bailout package's anti-foreclosure funds to provide legal assistance to borrowers facing foreclosure.¹³⁶ The Senate blocked similar funding, authorized by the Dodd-Frank financial reform bill, as part of a general spending cap, even though the legal aid was likely to produce a net savings in government funds as well as savings for investors and borrowers.¹³⁷

The Treasury Department explained its decision by noting that legal assistance is not strictly "necessary or essential" for borrowers to secure loan modifications.¹³⁸ Echoing the larger story of "unintended consequences," this rationalization excuses illegal and harmful actions by elites on the ground that law has little power to affect the results. By denying funds for legal assistance to homeowners victimized by foreclosure fraud, while further subsidizing banks for their dubious loan modification efforts, Secretary Geithner chose a legal course likely to fail in the face of "market" incentives for short-term gains from foreclosure fraud.

C. How Does the "Unintended Consequences" Story Invert the Power to Harm?

A third line of critical inquiry should examine how the "unintended consequences" story subtly inverts the picture of harmful or even illegal intent, making law's failure seem to be a problem of excessive and abusive power by those at the bottom. By suggesting that the interests of those most harmed already have received extensive attention and protection in law, it can then appear that further

134. Gretchen Morgenstern, *Opening the Bag of Mortgage Tricks*, N.Y. TIMES, Dec. 19, 2010, at BU1 (discussing \$5.1 million punitive damages award to investors for illegal actions mortgage servicers resulting in improper foreclosures); Laurie Roberts, *Banks Favor Foreclosing Over Altering Home Loans*, ARIZ. REPUBLIC, Dec. 4, 2010, at B1; Robert Selna, *Banks' Notices Seen as Faulty*, S.F. CHRON., Oct. 31, 2010, at A1; Teresa Dixon Murray & Michelle Jarboe, *The Next Crisis*, PLAIN DEALER (Cleveland, OH) Oct. 17, 2010, at A1 (warning of harmful results from rampant scandals in foreclosures, giving as examples one homeowner evicted and bankrupted after a fourteen cent error in his mortgage payment led to exorbitant late payment fees and another whose home was foreclosed by the same bank that refused the homeowner's mortgage payments on the ground that the bank did not hold the mortgage).

135. Joe Nocera, *The States Take On Foreclosures*, N.Y. TIMES, Oct. 30, 2010, at B1.

136. Zach Carter, *Geithner Blocking Legal Help for Foreclosure Victims*, HUFFINGTON POST (Dec. 14, 2010), http://www.huffingtonpost.com/2010/12/14/geithner-blocking-legal-h_n_796773.html.

137. Zach Carter & Ryan Grim, *Senate Sacrifices Struggling Homeowners to Budget Gods*, HUFFINGTON POST (Dec. 14, 2010), http://www.huffingtonpost.com/2010/12/21/senate-sacrifices-trouble_n_799861.html.

138. *Id.* (citing memo by Treasury Department General Counsel George Madison); see also, David Streitfeld, *Homes at Risk, and No Help from Lawyers*, N.Y. TIMES, Dec. 21, 2010, at A3 (discussing lack of legal services in California for foreclosure cases due to state law denying payment to foreclosure lawyers until their legal work is complete aimed at preventing swindles by lawyers working for modification firms).

attention and protection is likely to cause further harm. As a result, the story of “unintended consequences” invites policy reforms aimed at undermining egalitarian policies, even as it hides the motivating anti-egalitarian ideologies and interests by describing the logical effects as “unintended.”

For example, former Senator Gramm is one of many advocates of policies protecting high-risk financial gains by the wealthy who have used the term “unintended consequences” to blame the crisis and its harm on those with intentions for equality (rather than on purposeful policies of inequality).¹³⁹ A milder version of this theory holds that general enthusiasm for expanding credit and homeownership inadvertently encouraged complex and opaque financial instruments that hid systemic instability and fraud until it was too late to fix. More aggressive versions of this story assert that liberal support for racial and economic equality forced the financial industry to sacrifice economic soundness in a self-defeating attempt to protect poor and minority people from their own irresponsibility. This story typically fingers fair lending laws and government sponsored lending entities like Freddie Mac and Fannie Mae.

By making liberal intentions and public institutions the subject of the story, the “unintended consequences” argument uses rhetorical position to confer a presumption of power on egalitarian policies. At the same time, this narrative positions those who gain from unequal results as passive objects of others’ actions. In this picture of the crisis, the financial industry executives who earned outlandish compensation for their superhuman financial acumen and momentous responsibilities—and the prestigious scholars who cheered their success—were not capable of independently evaluating or acting on the evidence of risk in the subprime market and in the new financial arrangements that supported it. Further, this dazzling complexity appears to arise from external forces mysteriously set in motion by liberal law, rather than from the agency of conservative financial leaders, regulators, and academics, who actively supported financial complexity as creative productivity; and who purposefully dismissed the evidence that these financial schemes potentially foster illegality, illusion, and instability.

The “unintended consequences” story ignores how uncertainty and lack of knowledge is not just a limit on power but an effect and privilege of power. Consider the response of Roland Arnall, head of the largest subprime lending business and major contributor to the 2004 Bush Presidential campaign, to questions in a 2005 Senate hearing that led to his appointment as Ambassador to the Netherlands. Arnall emphasized that his important position insulated him from knowledge or responsibility for the concerns that had sparked legal actions against his companies by dozens of states, explaining that “unfortunate stuff happens” at a lot of big companies.¹⁴⁰ In one of many examples revealed in investigations of how his business banked on obscuring this “misfortune,” when fraud investigators at his company alerted senior management that (for example) their staff was selling mortgages on nonexistent properties, the managers’ response was to explain that securitization would off-load and hide the losses certain to result.¹⁴¹

Centering the story on the misguided power of egalitarian intentions begs

139. Gramm, *supra* note 58.

140. HUDSON, *supra* note 6, at 260.

141. *Id.* at 268.

the question of the intent as well as the influence of those who enabled the growth of risky mortgage lending and financial market complexity. Legal scholar Kurt Eggert gives detailed evidence showing that executives of leading subprime lenders were not blinded from risk by egalitarian impulses or overwhelmed by complexity, but instead rationally embraced a business strategy of boom, bust, and bankruptcy.¹⁴² These executives and many of those who assisted them calculated that the unsound loans would ruin their companies along with borrowers and downstream investors, but strategically insulated short-term profits so that they could walk away from the collapsing system with near-certain massive gains.¹⁴³

Classic stories of "unintended consequences" tend to not just evade non-egalitarian intent, but also to attribute that intent to proponents of liberal policies. By identifying elite interests with natural market forces, while positioning liberal intentions as the source of human power, the term tends to link narrow or "special" interests to proponents of liberal law rather than to elitist opposition to those laws. Like critical legal analysis, this story pokes holes in liberal ideals by recognizing that laws against discriminatory or predatory lending—or restrictions on speculative or nontransparent financial transactions—may spur even worse lending systems. But discussions of unintended consequences ultimately deflect critical analysis by attributing this harm to the essential flaws of liberal law, rather than (for example) to the contingent power of the financial industry to use campaign donations to block more effective regulations.

Many opponents of liberal regulation, for example, have blamed Fannie Mae and Freddie Mac, the government-backed mortgage financing entities, for contributing to the crisis through unsound practices encouraged by egalitarian intent and political influence. While the relatively marginal participation of those more legally constrained and supposedly public-serving entities gave some further legitimacy to the unsound investments sweeping the market, the interests and ideologies driving gain from exploitative lending would not disappear if liberal intentions and if egalitarian rhetoric were further pushed to the margins. Moreover, the power to exploit liberal intent would not appear as strong without the backing of inegalitarian law, such as the constitutional protections for corporate campaign spending.

By insisting that the mysteries and uncertainties of modern finance overwhelm the rational human planning of well-meaning government and industry leaders, the gentler "unintended consequences" story of liberal culpability directs fear and anger toward those on the bottom. If well-meaning expert leaders and mainstream institutions fail to maintain rational control, then this suggests that the most pathological people are in danger of taking over. The usual suspects of socioeconomic deviance, such as foreigners, immigrants, poor people, and racialized "inner city" communities, can then be rounded up to bear responsibility as economic insecurity fans popular fears. The myth that the mildly egalitarian policies of the 1977 Community Reinvestment Act (CRA)¹⁴⁴ forced gullible or powerless bank executives to back loans that they otherwise would have rejected as unprofitable

142. Eggert, *supra* note 99, at 1262-63.

143. See HUDSON, *supra* note 6, at 252 (discussing Ameriquest owner Roland Amall's strategic protection of his gains).

144. 12 U.S.C. §§ 2901-2908 (2010).

persists in the face of overwhelmingly contrary facts,¹⁴⁵ such as evidence that the vast majority of the loans driving the crisis were made by lenders outside the scope of the CRA;¹⁴⁶ that, indeed, the CRA generally restrained unsound lending where it did apply;¹⁴⁷ that the mortgage sellers and their financial backers rationally embraced unaffordable loans for short-term economic gain rather than out of irrational politics or idealism; and that, even worse, the CRA (along with antidiscrimination laws) had been insufficiently strong to prevent lenders from aggressively using race discrimination to exclude minority borrowers from affordable and regulated prime market loans and to steer them into predatory and fraudulent subprime loans.¹⁴⁸ Similarly, the logic that disproportionately blames low-income and minority homeowners for their irresponsible borrowing and complicity in mortgage fraud gets its power from attributing to those homeowners a level of rationality, knowledge, and independent agency denied to the financial industry actors (and their expert supporters) who gained the most from those unsound loans.¹⁴⁹

Further, by attributing the appeal of egalitarian policies to outsized and uninformed *intentions*, the “unintended consequences” story not only helps redirect blame toward traditionally victimized groups but also helps deny the power of their often superior knowledge and practical effectiveness. Ironically, as New York Times reporter Joe Nocera concludes from his book blaming both government and industry leaders for failing to pay attention to the harmful consequences of a high-risk financial system, those at the bottom and their closest allies stand out as the rare exceptions in the system who used their power and knowledge to take strong action to stop the unsound economic behavior that caused the crisis.¹⁵⁰ Many community activists, anti-poverty advocates, minority groups—and the state prosecutors and lawmakers who listened to this constituency—produced and acted on accurate ground-level knowledge of the dangers of the system, but were constrained by the institutionalized power of industry lobbyists and political donors and also by the government leaders, judges, and scholars who have helped expand federal preemption, constrain consumer litigation, and otherwise interpret laws to limit the power of state governments and of private citizens to give teeth to egalitarian laws.

145. See Mary Kane, *Scapegoating Minorities for Failures of Banking*, FAIRNESS AND ACCURACY IN REPORTING (Jan. 2009), <http://www.fair.org/index.php?page=3669> (discussing how the media spread this myth and the contrary evidence that discrimination against minorities fueled the crisis).

146. BAKER, *supra* note 63, at 30.

147. National Community Reinvestment Coalition, *Safe and Sound Lending In Neighborhoods: An Examination of the Community Reinvestment Act (CRA) at Work in Washington, D.C. and Houston, TX* (Aug. 2010), http://www.ncrc.org/images/stories/mediaCenter_reports/ford_nhood%20analysis-execsum.pdf (giving evidence that CRA lending increased prime loans, not subprime lending, in minority and modest income neighborhoods).

148. See Ira Goldstein & Dan Urevick-Ackelsberg, *Subprime Lending, Mortgage Foreclosures, and Race*, Kirwan Institute for the Study of Race and Ethnicity 4 (2008) http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/pdfs/goldstein_trf_paper.pdf (discussing studies suggesting race discrimination rather than financial risk decreased supply of prime mortgage lending to African Americans and Latinos); *id.* at 7 (discussing evidence of decreased enforcement of race discrimination in lending by federal government between 2001 and 2008).

149. See HUDSON, *supra* note 6, 251 (explaining a state investigator’s analysis of why lenders rather than borrowers were the primary source of fraud).

150. Goodman, *supra* note 122.

D. How Does "Unintended Consequences" Analysis Dismiss More Effective Alternatives?

Fourth, we should ask how the debate about more effective legal and political action gets cut off by labeling bad results as "unintended consequences." In his writings on the crisis, Judge Posner argues against aggressive law reforms by stressing that the vast uncertainty and complexity of modern financial markets and the limited knowledge of regulators make such reform more risky than inaction.¹⁵¹ Numerous financial law reforms have been challenged on the ground that even modest restrictions on financial elites will backfire to produce further harm, as lenders, rating agencies, investors, and associated financial industry interests resist or circumvent those laws: for example, by constricting needed credit, by seeking profits from even less transparent instruments and in more shadowy and unregulated financial sectors, or perhaps by effectively using their economic influence in elections or regulatory agencies to undo these modest changes.¹⁵² One widely publicized quip from a Republican Congressman summed up the 2010 Dodd-Frank financial reform legislation as having "three unintended consequences" on each of its over 2,000 pages.¹⁵³

It may well be true that Wall Street still has plenty of power to bring down Main Street if Wall Street doesn't continue to get its way. Maintaining lax regulations and indulgences such as lavish executive compensation and government subsidies may seem necessary because Wall Street controls the credit on which Main Street, not to mention inner city and rural America, depends. But Wall Street's power to resist regulation and to transfer the losses of its risk-taking is not a problem of the inscrutable "invisible hand" of economics, of the inevitably limited knowledge of regulators, or of the inherent powerlessness of law. By taking a step further to challenge the contingent legal structures and ideas about law that support this power, we can show how regulatory reforms could more effectively be structured to avoid harming so much of Main Street America and so many communities of color.

Unlike critical legal scholarship that carefully analyzes strategies for redirecting and resisting law's harmful politics, the idea of "unintended consequences" tends to divert attention from the problem of power even as it seems to recognize it. By stopping short of detailed examination of the structural context shaping extra-legal power, stories of "unintended consequences" tend to lead away from the creative and rigorous analysis of the foundational rules and assumptions shaping the politics of law. For example, even though Sunstein's analysis of the failures of campaign finance regulation recognizes the challenges of breaking through incumbent political power, he takes incumbents' anti-democratic interests as an enduring fact of political life without carefully digging into the legal underpinnings of that power. Ignoring existing or historic evidence that less oligarchic political systems can be possible, he narrows his inquiry and imagination

151. POSNER, *supra* note 112, at Ch. 5, 11.

152. See, e.g., Tom Petruno, *A Fix, But for Better and For Worse?*, L.A. TIMES, June 26, 2010, at 1B (quoting Ed Yingling, president of the American Bankers' Association prediction of decreased credit from banking restrictions).

153. Daniel Henninger, *A Plague of Vagueness*, WALL ST. J., July, 1, 2010, at A17 (suggesting the remark from Jeb Hensarling (R., Texas) should be in the Bartlett's famous quotations book).

to exclude reforms that go beyond simply regulating campaign spending to consider the framework that makes that incumbent spending so difficult to resist (winner-take-all rather than proportional voting, for instance). As a result, Sunstein concludes with half-hearted suggestions for accommodating rather than resisting money's corrupting power.¹⁵⁴ Draining the issue of political equality of its moral force and popular appeal, his focus on the "unintended consequences" of campaign finance regulation portrays the policy options as highly uncertain and complex calculations of largely offsetting costs and benefits, making inaction and acquiescence as attractive as change.

Turning to the recent crisis, if we understand the harmful effects of the Federal Reserve's monetary policy as a problem of clearly articulated and highly effective bias toward elite financial interests at the expense of others, a logical legal solution—with the possibility of uniting right and left radical political energy—could be not just to institute more consumer protection rules within or without the Federal Reserve, but to shift power over the Federal Reserve from financial industry experts to democratic oversight and involvement. Further, if the government solved the problem of "too big to fail" financial firms by breaking up these firms rather than by propping them up, it could not only improve financial market stability but also set in motion a "virtuous" circle of competitive pressures that would decrease the banks' current power to influence political campaigns, executive culture, and legal ideology.¹⁵⁵

For another example, progressive economist Dean Baker proposes changing the background rules of mortgage lending to decrease banks' power over borrowers, explaining that this would more effective than the Obama Administration's failing "incentive-based" effort to prevent foreclosures by subsidizing loan modifications.¹⁵⁶ Even if those subsidies were more strictly regulated, their effectiveness would likely be reduced by the costs of adequate enforcement and further "creative" gaming by banks.¹⁵⁷ Instead, if law reforms gave homeowners facing foreclosure the right to rent their foreclosed homes for several years at market rates, foreclosure would be less profitable for banks while homeowners and communities would avoid harmful displacement, vacancies, and property devaluation.¹⁵⁸

The problem with the upwardly redistributive politics driving the recent crisis is not uncertainty about what legal reforms would be effective in breaking the power of oligarchy in Congress, but the lack of organization and leadership to build power to fight for those reforms.¹⁵⁹ The right-wing political movement for upward redistribution has demonstrated that organization and leadership is not a matter of "politics" beyond the scope of law but instead can be shaped by stories about law as well as by changing legal technicalities.¹⁶⁰ One step in changing these politics would be to replace simplistic and fatalistic legal stories of "unintended consequences" with careful and creative legal work showing how alternative laws could make things different.

154. Sunstein, *supra* note 52, at 1411-14.

155. JOHNSON & KWIAK, *supra* note 7, at 219.

156. BAKER, *supra* note 63, at 94-95.

157. *Id.*

158. *Id.* at 96-97.

159. HACKER AND PIERSON, *supra* note 20, at 303; JOHNSON & KWIAK, *supra* note 7, at 221.

160. STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

IV. RECLAIMING THE POWER OF EGALITARIAN-POLICY

By essentializing current inequalities as the best of all possible worlds, the concept of "unintended consequences" has come to deliver a message of disentanglement to power in the guise of a superficial critique of law's politics. As a counterpoint, consider Derrick Bell's critical race analysis of the politics of law. Bell has argued that racial justice efforts should appeal to white self-interests rather than to legal and moral equality principles.¹⁶¹ Yet Bell's "interest convergence" theory does not take white interests in racial privilege as a fixed fact to be accommodated or incentivized, or to be left to experts for cautious calculation of the costs of racial backlash. He instead focuses on the possibilities for grassroots movements to emphasize the beneficial spillover effects from policies promoting racial equality, as part of an effort to divide and to reformulate white interests and identities, and to build new political coalitions against economic elites.¹⁶² Applied to the financial crisis, for example, the backlash against fair lending and community reinvestment requirements shows not that these policies are inevitably self-defeating but that more political, ideological, and legal work must be done to show how broad socioeconomic gains could come from a financial system that better protects those in the middle and at the bottom.

The theme that harmful consequences matter more than good intentions in economic policy strikingly contradicts another prevailing view of law. To a large extent, courts have applied contemporary equality doctrine to allow superficially neutral intentions to excuse racially harmful consequences.¹⁶³ In response to extensive statistical evidence of unequal racial results in mortgage lending, for example, the banking industry has mobilized a campaign to narrow civil rights laws to allow only claims of discriminatory intent, not discriminatory impact.¹⁶⁴ Many scholars, judges, and advocates have rationalized a broader trend to limit what counts as unlawful race discrimination on the theory that unequal racial results are naturally and normally driven by benign intent—such as reducing costs, measuring merit, or enhancing flexibility and discretion in mortgage pricing or in death penalty sentencing¹⁶⁵—and that these presumed and potential good purposes count more than actual evidence of harmful racial results or covert harmful racial intent.

How can we explain this contradictory logic that insists on evaluating

161. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

162. Derrick Bell, *On Celebrating an Election as Racial Progress*, AM. BAR ASSOC. HUMAN RIGHTS MAGAZINE, Fall 2009, p. 2, 3-4, available at http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_fall09_home/irr_hr_fall09_bell.html.

163. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical View of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1977-78); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997).

164. Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and The Equal Credit Opportunity Act*, 18 PUB. INT. L.J. 1 (2008).

165. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (refusing to apply heightened scrutiny under the Equal Protection clause to Georgia's death penalty despite statistical evidence of racial disparities in sentencing).

economic regulation by its consequences while evaluating discrimination by overt intent? Both precepts reflect an underlying problematic principle that what is truly harmful in law is caring about harm to those at the bottom, especially the racialized bottom. That principle assumes unequal harm results from an unassailable natural (or supernatural) order that (rightly or wrongly) transcends law. Laws with overtly egalitarian substantive intent to protect those at the bottom will be redirected by this higher power to malign or to wasteful ends, hurting those at the bottom. At the same time, in this flawed logic, laws with more neutral intent must not be scrutinized or challenged for malign or misguided harmful effects on those at the bottom, out of fear that disturbing the existing hierarchical order will risk a backlash of even greater inequality. Either way, law appears out of place and unreasonable when it attempts to intervene in the existing conditions of inequality.

Consider a recent case brought by the city of Baltimore against Wells Fargo claiming that overt, intentional racially discriminatory lending in violation of fair housing laws led to concentrated foreclosures that in turn reduced property values and increased the city's costs for social services, police and fire protection.¹⁶⁶ The court dismissed the case for lack of standing, acknowledging that the plaintiffs may have had sufficient evidence that the lenders exploited borrowers because of their social and economic "dysfunctional environment," but concluding that unscrupulous lenders cannot reasonably be assumed to have caused the "dysfunctional environment" that they exploited.¹⁶⁷ The court refused to allow the city to bring expert evidence that Wells Fargo's predatory lending contributed to the harmful conditions from which it illegally profited, although it did allow the city to bring claims of more limited harm.¹⁶⁸ The court's reasoning seemed to naturalize and legitimate both the harmful racial consequences and the harmful racial intent of subprime lending. By suggesting that the "dysfunctional environment" in African-American communities was the *cause* of the racially biased lending, and therefore not plausibly also an *effect* of that exploitation, the court's ruling subtly suggests that intentional race discrimination—and its harmful effects—can be a normal and natural response to the normal and natural powerlessness of communities of color.

By similarly making structures of inequality appear beyond the reach of law reform, the "unintended consequences" message helps update and reinforce the narrowing of protections against intentional racial harm. Justice is centrally a question of whose interests and whose harms should count, in what context and in what form and to whom. Power is centrally about being able to act without having to take harm to others into account. This power to gain by harming others is strongest when it operates through systems and structures that make disregarding that harm

166. *Mayor and City Council of Baltimore v. Wells Fargo, N.A.*, 677 F. Supp. 2d 847 (D. Md. 2010); Raymond H. Brescia, *On Private Plaintiffs and Public Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 27-28 (2010) (discussing the ruling dismissing the case on standing grounds); see also Raymond H. Brescia, *Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Crisis*, 2 ALB. GOV'T. L. REV. 164, 175-78 (2009) (discussing the allegations of race discriminatory lending in the Baltimore case).

167. *Wells Fargo, N.A.*, 677 F. Supp. 2d at 851 (stating that although "unscrupulous lenders" may have illegally taken advantage of "inner city residents living in a dysfunctional environment," it does not follow that it is reasonable to infer "that the unscrupulous lenders themselves caused the dysfunctional environment that they exploited").

168. *Id.*

appear routine, rational, and beneficial or at least acceptable or perhaps inevitable. By portraying law's unequal harms as the "side effects" of systems and structures with unquestionable "main effects," the "unintended consequences" story helps affirm the resulting harm even as it seems to offer sympathy and technical assistance.

In considering solutions to the financial market problems, the policy puzzle is not that struggling homeowners' interests are overwhelmingly complex or uncertain. Instead, the bigger problem is that overwhelmingly powerful interests and ideologies are actively resisting systemic changes that would make those interests count. The failure to criminally prosecute or otherwise severely penalize high-level financial industry fraud is not primarily the result of uncertainty about the harmful effects of that fraudulent behavior, but because the political and justice systems are skewed to protect the gains and unaccountability of wealthy executives despite the clear harms to hosts of others. The unequal effects of the prevailing policy response to the crisis are foreseeable and obvious, not accidental or surprising. It would not take advanced knowledge of economics to readily predict that modest-income homeowners would tend to be far worse off than bank executives by a policy approach that failed to provide substantial mortgage forgiveness and foreclosure protections for modest-income homeowners but instead provided massive subsidized credit and other protections for Wall Street. Many policy actions likely to alleviate the unequal harm of the crisis similarly are impeded not because consumer advocates, low-income homeowners, or racial justice advocates hesitate to risk major changes in existing systems, or are divided about the technical design of alternative programs or more effective mechanisms for enforcing laws against fraud and racial discrimination. Instead, the problem is that these voices pressing for effective change are often excluded, drowned out or distorted in Congress and in federal agencies such as the Treasury Department and the Federal Reserve, or in the media, in the mainstream economics profession, and to a large extent in legal scholarship about financial markets. More generally, those diverse voices from the bottom have been largely absent or marginalized in the dominant theoretical framework that constructs widespread and severe inequality as unforeseeable and largely inevitable, or even beneficial.

Moreover, justice requires careful attention to both harmful intent and to complex harmful effects. But the concept of "unintended consequences" inverts justice by suggesting that the best way to care for those at the bottom is to not care to make law more attentive to the bottom. "Unintended consequences" arguments promote a simplistic moral message in the guise of sophisticated intellectual critique—the message that those who lack power should not seek it because the desire for more power is what hurts most. Further, like Ayn Rand's overt philosophy of selfishness, that message promotes the theme that those who have power to ignore their harmful effects on others need not—indeed should not—be induced by law to care about this harm, because this *caring* is what is harmful. One right-wing think tank has recently made this moral message more explicit with an economic values campaign suggesting that the intentional pursuit of economic equality is a problem of the immoral envy of those whose economic success proves they are more deserving.¹⁶⁹ Legal scholars and advocates who intend to put intellectual rigor and

169. See *Grieving the Good of Others: Envy and Economics Project on Values and Capitalism* (Sept. 20, 2010 Conference), AM. ENTER. INST., <http://www.aei.org/event/100292>.

justice ahead of service to financial elites should reject stories of “unintended consequences” and instead scrutinize the power and laws that have so effectively achieved the intention of making devastating losses to so many of us seem natural, inevitable, and beneficial.